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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Amendment of Parts 21 and 74 to Enable) MM Docket No. 97-217
Multipoint Distribution Service and)
Instructional Television Fixed Service) File No. RM-9060
Licensees to Engage in Fixed)
Two-way Transmissions)

CONSOLIDATED REPLY

The over 110 wireless communications system operators, Multipoint Distribution Service ("MDS") and Instructional Television Fixed Service ("ITFS") licensees, equipment manufacturers and consultants who were parties to the Petition for Rulemaking that commenced this proceeding (collectively, the "Petitioners"), by their attorneys and pursuant to Section 1.429(g) of the Commission's Rules, hereby submit their consolidated reply to the pleadings submitted by Instructional Telecommunications Foundation, Inc. ("ITF") and Catholic Television Network ("CTN") opposing certain of the pending petitions for reconsideration of the *Report and Order on Reconsideration* (the "*Reconsideration Order*") in this proceeding.^{1/}

I. INTRODUCTION.

Before turning to Petitioners' disagreement with pending proposals that serve neither the ITFS community, commercial operators, nor the public, the Commission should note that there is

^{1/} See *Amendment of Parts 1, 21 and 74 to Enable Multipoint Distribution Service And Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions; Request for Declaratory Ruling on the Use of Digital Modulation by Multipoint Distribution Service and Instructional Television Fixed Service Stations*, 14 FCC Rcd 12,764 (1999) [hereinafter cited as "*Reconsideration Order*"]. In addition, the Petitioners are submitting as Appendix A a revised draft of a proposed replacement to Appendix D of the *Reconsideration Order*. This revision reflects certain editorial changes made to the proposed replacement submitted with the Petitioners' February 10, 200 Consolidated Comments and Partial Opposition after consultation with several engineers and technical consultants who have been involved in this proceeding.

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no disagreement whatsoever with respect to many of the issues raised by the Petitioners in their November 23, 1999 Petition for Further Reconsideration. For example,

- There has been no opposition to the Petitioners' proposal that the Commission defer booster service area interference protection for low-power boosters until after the initial filing window.^{2/}
- No objection was lodged to the Petitioners' suggestion that the Commission extend "grandfathered" status to ITFS excess capacity leases entered into prior to March 31, 1997 that contain provisions under which they are to be automatically renewed after March 31, 1997.^{3/}
- Every party commenting on the issue agreed with the Petitioners that the new rules should be amended to conform to the Commission's decision to permit all ITFS licensees to engage in channel shifting, even if they transmit solely utilizing analog modulation.^{4/}
- The Petitioners' proposal that the Commission maximize licensee flexibility and promote spectral efficiency by allowing channel swaps to occur between licensees regardless of whether their facilities are "in the same system" was not opposed.^{5/}

On another issue, although CTN claims it "opposes" a recommendation advanced by the Petitioners, in fact there is no disagreement. In their Petition, the Petitioners urged the Commission to amend Sections 21.909(g)(6) and 74.939(g)(6) to clarify that when a licensee exercises its right to subchannelize without specific Commission approval pursuant to Sections 21.909(a) or 74.939(a) and limits the maximum EIRP emitted by any individual response station proportionately to the fraction of the 6 MHz channel that the response station occupies, the licensee may operate

^{2/} See Petition of Petitioners for Further Reconsideration, MM Docket No. 97-217, at 2-6 (filed Nov. 23, 1999)[hereinafter cited as "Petitioners Petition"].

^{3/} See *id.* at 6-9.

^{4/} See *id.* at 14-15. See also Consolidation Opposition of BellSouth Corporation and BellSouth Wireless Cable, Inc. to Petitions for Reconsideration, MM Docket No. 97-217, at 2, n. 3 (filed Feb. 10, 2000)[hereinafter cited as "BellSouth Opposition"]; Petition of BellSouth Corporation and BellSouth Wireless Cable, Inc. for Reconsideration, MM Docket No. 97-217, at 15 (filed Dec. 21, 1999)[hereinafter cited as "BellSouth Petition"].

^{5/} See Petitioners Petition, at 15-17.

simultaneously on each subchannel the same number of response stations specified in its initial interference analysis.^{6/} CTN “opposes” this proposal, unless the Commission “include[s] a requirement that all transmitters operating on subchannels of the same channel must have identical RSAs.”^{7/} However, what CTN misses is that the Petitioners did not propose rule changes that would have allowed a response station hub licensee that subchannelizes without specific Commission approval to utilize different response service areas for different subchannels or to in anyway avoid the obligation under Section 21.909(g)(1) or 74.939(g)(1) to only operate response stations within the response service area specified in its application for the hub.^{8/} In other words, the Petitioners have proposed precisely what CTN desires.

There are three issues, however, where the Petitioners vehemently disagree with the views expressed by CTN and, in one case, by ITF. The remainder of this reply will be devoted to those issues.

II. DISCUSSION.

A. THE COMMISSION SHOULD PERMIT AN ITFS LICENSEE TO CONSTRUCT AND LEASE CAPACITY ON A BOOSTER STATION LOCATED IN ITS PSA, EVEN IF THERE IS NO IMMEDIATE FORMAL EDUCATIONAL USAGE, SUBJECT TO COMPLIANCE WITH CAPACITY RESERVATION REQUIREMENTS.

In their Petition for Further Reconsideration of the *Reconsideration Order*, the Petitioners urged the Commission to exempt from the minimum usage rules, but not from the recapture and

^{6/} See *id.* at 10.

^{7/} Comments of Catholic Television Network on Petitions for Reconsideration, MM Docket No. 97-217, at 8-9 (filed Feb. 10, 2000)[hereinafter cited as “CTN Opposition”].

^{8/} Under Sections 21.909 and 74.939 of the Commission’s Rules, an applicant must seek specific authority from the Commission before altering its response service area. And, contrary to CTN’s assertion, those rules do not provide any mechanism for an applicant to even apply for different response service areas for different subchannels within the same 6 MHz channel.

reservation rules, those ITFS booster stations serving geographic areas that are within the ITFS licensee's protected service area ("PSA"), but outside the area where the ITFS license has a formal educational use.^{9/} The rationale was simple – no legitimate interest is advanced by preventing the use of ITFS channels for the delivery of commercial broadband services from a booster simply because the ITFS licensee has no immediate use for that booster in furtherance of the educational mission of an accredited school. BellSouth supported the Petitioners's proposal.^{10/}

CTN's opposition to the Petitioners is predicated on a *non sequitur*; that "the Part 74 rules have never required an ITFS station to serve all of the area within which it may have received protection from harmful interference."^{11/} While that is certainly true, it is of no relevance to this discussion. The Petitioners are not suggesting the Commission impose any build-out requirement on ITFS licensees; rather, they are suggesting that the Commission not impose overly-stringent educational usage restrictions on those ITFS licensees and their commercial partners who desire to fully serve an ITFS PSA.

Make no mistake – the Petitioners agree that the Commission must impose some minimum educational usage requirements on ITFS licensees to assure that licensees are not securing authorizations purely to lease excess capacity. The minimum usage test adopted in the *Report and Order* and codified at Section 74.931(a)(1) meets that objective. That rule currently provides that "[a]uthorized instructional television fixed station *channels* must be used to further the educational mission of accredited schools offering formal educational courses to enrolled students."^{12/} It should

^{9/} See Petitioners Petition, at 12-14.

^{10/} See BellSouth Opposition, at 6 n. 16.

^{11/} CTN Opposition, at 4.

^{12/} 47 C.F.R. §74.931(a)(1)(emphasis added).

be interpreted to provide that so long as the ITFS licensee utilizes a given channel for the transmission of complying material from one of its facilities, it need not make formal educational usage of every booster. Unfortunately, it is not clear that this is what the Commission intended.

What is crystal clear is that adoption of the CTN proposal that every booster be required to transmit formal educational material would seriously undermine the deployment of the facilities the commercial operator needs to provide ubiquitous coverage throughout its service area. The fundamental flaw in CTN's argument is that it ignores the Commission's grant of a thirty-five mile radius circular PSA to every ITFS licensee. While some ITFS licensees (such as state universities) may well have educational objectives throughout their 3,849 square mile PSA, others (such as local public school districts) likely will not. Yet, under the Commission's PSA rules, a given ITFS licensee is the sole party eligible to provide service on its licensed frequencies within its PSA. As a result, if that ITFS licensee cannot deploy facilities in a portion of its PSA because it does not have an immediate formal educational need, its licensed frequencies must lay fallow.

It is difficult to square that result with the Commission's objective in this proceeding "to facilitate the most efficient use of the affected spectrum."^{13/} Nor can one square that result with the Commission's recognition that MDS/ITFS-based two-way digital services will prove a boon to consumers, affording them a new competitive choice in the emerging market for broadband video, voice and data services.^{14/} But, perhaps most importantly, it is impossible to square that result with the Commission's pro-education agenda in this proceeding. Even if a particular booster is not being

^{13/} *Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service And Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions*, 13 FCC Rcd 19112, 19115 (1998) [hereinafter cited as "*Report and Order*"].

^{14/} *See id.* at 19116.

used initially for the transmission of materials that further the educational mission of accredited schools offering formal educational programming, that is not to say that it yields no educational benefits. To the contrary, the booster will allow members of the public “to take advantage of new video-conferencing, distance learning and continuing education opportunities” that the Commission has recognized will be provided over cellularized MDS/ITFS-based broadband systems.^{15/} Moreover, permitting the ITFS licensee to lease capacity on that booster will enhance the leasing revenues available to that licensee to otherwise promote its educational agenda.^{16/} And finally, because the Petitioners are not proposing any reduction in the portion of the booster’s capacity that must be made available for use by the ITFS licensee, allowing the deployment of the booster will provide a vehicle for the ITFS licensee to rapidly meet formal educational needs in the area as soon as those needs develop.^{17/} In other words, even without formal educational usage, the booster in issue will serve an educational purpose.

Finally, there is ample precedent for the relief the Petitioners seek. For most of the first decade of excess capacity leasing, the Commission consistently rejected applications for ITFS stations that proposed omnidirectional antennas if the ITFS applicant’s educational receive sites were clustered in only a portion of the coverage pattern and could be served with a directional antenna. A decade ago, however, the Commission recognized that this approach was adversely impacting the

^{15/} *Report and Order*, 13 FCC Rcd at 19116.

^{16/} *See id.* at 19117.

^{17/} By contrast, once a commercial operator has designed its cellularized two-way system, it will be more difficult for the operator to alter the cell-siting and frequency reuse pattern to permit channels to be added at any given location. Thus, unless the rule is changed as suggested by the Petitioners, the ITFS licensee who does not have a present educational need in a given portion of its PSA may find it difficult to add facilities in that area in the future should an educational demand materialize.

utilization of ITFS channels for wireless cable service (which usually required omnidirectional coverage in order to reach the critical mass of potential subscribers necessary to succeed). As a result, it adopted Section 74.931(e)(7) of the Rules, which provides that “[a]n ITFS applicant, permittee, or licensee may use an omnidirectional antenna to facilitate the leasing of excess capacity to ‘wireless cable’ operators.”^{18/} In so doing, the Commission recognized that the public interest benefits of making a competitive commercial service available justified allowing an ITFS licensee to operate transmission facilities that served an area far beyond its educational needs. The Petitioners are merely asking for the same treatment here – the only difference is that the ITFS licensee will be serving its PSA from a series of smaller cells rather than from the single omnidirectional transmission facility of the past.

B. THE COMMISSION SHOULD PERMIT AN ITFS LICENSEE TO AGREE THAT IT WILL NOT ASSIGN ITS LICENSE WITHOUT ASSIGNING THE LEASE.

In its petition for reconsideration, BellSouth has called upon the Commission to repeal the policy against ITFS excess capacity lease provisions that bar the ITFS licensee from assigning its license without concurrently assigning the rights and obligations under the excess capacity lease.^{19/} Although the Petitioners expressed strong support for BellSouth’s position in their most recent filing,^{20/} both CTN and ITF have taken issue with the BellSouth proposal.^{21/} Yet, while both CTN

^{18/} 47 C.F.R. §74.931(e)(7), *adopted in Amendment of Parts 21, 43, 74, 78 and 94 of the Commission’s Rules Governing use of the Frequencies in the 2.1 GHz and 2.5 GHz Bands*, 6 FCC Rcd 6764, 6767 n. 11 (1991).

^{19/} See BellSouth Petition, at 3-11.

^{20/} See Consolidated Comments and Partial Opposition of Petitioners, MM Docket No. 97-217, at 2-3 (filed Feb. 10, 2000)[hereinafter cited as “Petitioners Opposition”].

^{21/} See CTN Opposition, at 5-6; Consolidated Opposition of Instructional Telecommunications Foundation, Inc. to Petitions for Further Reconsideration and Petition for Clarification and Further Reconsideration, MM Docket No. 97-217, at 1-4 (filed Feb. 9, 2000)[hereinafter cited as “ITF Opposition”].

and ITF cite the promotion of ITFS licensee flexibility as the rationale for their position,^{22/} they both advocate an inflexible approach.

It is important for the Commission to recognize that neither BellSouth nor the Petitioners have advocated a rule requiring that every ITFS licensee assigning its license also assign its excess capacity lease. Rather, they are proposing that an ITFS licensee have the flexibility to agree, *or not to agree*, that it will only assign its license during the excess capacity lease term if the assignee agrees to assume the remaining obligations under the lease. As both BellSouth and the Petitioners have established, and as the Commission implicitly recognized in extending the maximum ITFS excess capacity lease term to 15 years, commercial operators are likely to spend more in the development of spectrum which will be available for the full lease term than for spectrum that could be lost before the ink on the lease is dry.^{23/} It is certainly reasonable to expect that many an ITFS licensee would be willing to forego the supposed benefit of being able to assign its authorization without having to assign the lease in order to entice the commercial operator to invest more in the development of its ITFS spectrum.^{24/}

^{22/} See CTN Opposition, at 6 (“if an ITFS licensee wants to assign its license, it should be able to do so without being forced to find a successor willing to be bound by the excess capacity lease”); ITF Opposition, at 3 (“ITF believes that the Commission’s existing policy offers ITFS licensees both extensive and appropriate flexibility.”).

^{23/} See BellSouth Petition, at 6-8; Petitioners Opposition, at 2-3; *Report and Order*, 13 FCC Rcd at 19183 (“[T]he conversion to digital operations, whether two-way or merely downstream, will entail a substantial increase in operational and infrastructure costs,” and that as a result, fifteen year excess capacity lease terms will be necessary because “the investment community will require even far greater comfort regarding the long-term availability of excess capacity on ITFS channels.”).

^{24/} ITF appears to argue that this issue is of no import because some companies have been willing to invest in the industry under the current, unsatisfactory regulatory regime. See ITF Opposition, at 2 n.2. What ITF ignores, however, is that the future level of investment by those companies and others in the anticipated development of advanced telecommunications facilities utilizing ITFS channels may well depend on whether the Commission is willing to provide commercial lessees with greater assurance that ITFS licensees will be bound by the terms of their contracts. As ITF’s own president noted recently to the press, commercial operators like Sprint and MCI WorldCom have only acquired

Retention of the Commission's paternalistic approach will not be without a price. The *Report and Order* stressed that one of the Commission's objectives was to "increase the value of [ITFS] spectrum to ITFS licensees both for their own use and as a leasable asset."^{25/} Denying commercial operators certainty that they will have access to leased spectrum throughout the term hardly accomplishes that goal. Nor does the possible loss of service inherent in the current policy advance the *Report and Order*'s objective of providing "significant benefits to consumers" through the introduction of ITFS-based broadband service.^{26/} Before rejecting the approach advocated by BellSouth and the Petitioners, the Commission should consider how it will explain to those consumers who lose access to important services when an ITFS licensee decides to renege on its lease commitment that the public interest has been served.

In short, the position advocated by BellSouth and the Petitioners is fully consistent with the Commission's determination in the *Report and Order* that in overseeing excess capacity leases it should have "a limited role which allows for maximum possible flexibility of the parties in establishing excess capacity lease provisions"^{27/} Commercial operators, ITFS licensees and, most importantly, the public will all benefit by permitting ITFS licensees, if they so choose, to bargain for consideration in exchange for agreeing they will not assign their ITFS licenses without assigning the remaining obligations under any excess capacity lease.

licenses for MDS spectrum, not for ITFS spectrum. See Gomez, "Wireless Broadband Strategies to Pay Off in Coming Years," *Private & Wireless Broadband*, at 16 (Feb. 2000). A lack of long-term access to ITFS spectrum may well spur commercial operators to devote a disproportionate amount of resources towards the MDS spectrum.

^{25/} See *Report and Order*, 13 FCC Rcd at 19117.


^{26/} *Id.* at 19116.

^{27/} See *id.* at 19180.

C. TO AVOID THE PRECLUSION OF NEW OR MODIFIED FACILITIES CONTEMPLATED BY NEIGHBORS, THE COMMISSION SHOULD REJECT CTN'S PROPOSAL TO PERMIT THE REGISTRATION OF RECEIVE SITES BEYOND THE BOUNDARY OF THE CIRCULAR 35-MILE RADIUS PSA.

Finally, the Petitioners note that BellSouth's latest pleading advances a series of arguments similar to those previously presented by the Petitioners in opposition to CTN's call for reconsideration of the decision announced in the *Report and Order* and confirmed in the *Reconsideration Order* to cease the registration of ITFS receive sites as of September 17, 1998, including those receive sites located more than thirty-five miles from the transmitter site.^{28/} For the reasons advanced by the Petitioners and now by BellSouth, the CTN proposal should be rejected.

Respectfully submitted,

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^{28/} See BellSouth Opposition, at 7-10; Petitioners Opposition, at 8-12.